PEILIS SAMI

v.

PP

COURT OF APPEAL, KOTA KINABALU
HISHAMUDIN MOHD YUNUS JCA
AZAHAR MOHAMED JCA
BALIA YUSOF WAHI JCA
[CRIMINAL APPEAL NO: S-09-51-02-2012]
14 MAY 2014

CRIMINAL PROCEDURE: *Sentence - Adequacy - Rape and attempted rape of 15-year-old minor - Whether appellant taking advantage of vulnerability of minor - Duty of court - Whether to protect minor from unscrupulous sexual prowlers - Whether punishment imposed by Sessions Court (26 years' jail) fair and adequate - Penal Code, s. 376(1)*

This was an appeal against the decision of the High Court affirming the decision of the Sessions Court who convicted and sentenced the appellant to four years' jail, 11 years' jail and 11 years' jail, with the sentences to take effect consecutively, for attempted rape and two counts of statutory rape under s. 376(1) of the Penal Code, respectively. It was not in dispute that at the material time, the appellant was aged 25 years while the complainant was 15 years and 4 months old. Essentially, it was the appellant's contention that the sentences as passed and affirmed by the courts below were excessive, considering that both he and the complainant were lovers, that the sexual acts were consensual, that the complainant was then almost 16 and that the complainant have had sexual experiences with other men previously.

Held (dismissing appeal; affirming convictions and sentences)
Per Hishamudin Mohd Yunus JCA delivering the judgment of the court:

(1) The courts, in considering what ought to be the appropriate sentence in cases of statutory rapes, must never for a moment, lose sight of the fact that they have a duty to protect young girls such as the complainant from unscrupulous men such as the appellant, always on the prowl to take sexual advantage

A of female minors. The courts must give the correct message that the courts view such offences with much detestation. (para 20)

(2) Any sentence to be imposed on the appellant as an offender B guilty of several moral offences, must be with a view to achieve the following purposes, namely, retribution, deterrence and reformation in that order of importance. On the facts and in the circumstances, the punishment as imposed by the Sessions Court Judge was fair and commensurate with the C seriousness of the offences committed by the appellant. (paras 17, 18, 19 & 21)

(3) The fact that the appellant and the complainant were lovers and that the sexual acts were consensual is not a mitigating factor as the complainant was a minor and the appellant was D 25. The appellant's conduct rather was that of a person taking advantage of the vulnerability of the complainant by reason of her young age and close relationship with the appellant. Further, the appellant's plea that the complainant have had sexual experiences with other men, far from being a plea in E mitigation, was mischievous to say the least. Far from attracting the sympathy of this court, the plea shows that there is no feeling of remorse or shame or sympathy on the part of the appellant for what he had done. The fact that the complainant might have had sexual encounter with other men F is also irrelevant for the purpose of the plea in mitigation. (para 23)

Bahasa Malaysia *Translation Of Headnotes*

G Ini adalah rayuan terhadap keputusan Mahkamah Tinggi kerana mengesahkan keputusan Mahkamah Sesyen yang mensabit dan menjatuhkan hukuman 4 tahun penjara, 11 tahun penjara dan 11 tahun penjara ke atas perayu, dengan hukuman diperintah berjalan secara berasingan, masing-masing atas satu kesalahan cubaan H merogol dan dua kesalahan rogol statutori di bawah s. 376(1) Kanun Keseksaan. Tidak dinafikan bahawa perayu pada waktu material berumur 25 tahun sementara pengadu 15 tahun 4 bulan. Secara pentingnya, hujah perayu adalah bahawa sabitan dan hukuman seperti yang dijatuh dan disahkan oleh kedua-dua I mahkamah di bawah adalah keterlaluan beratnya, memandangkan beliau dan pengadu adalah sepasang kekasih, bahawa perlakuan

seks adalah secara sukarela, bahawa pengadu pada masa itu hampir mencapai umur 16 tahun dan bahawa pengadu sebelum itu pernah mengadakan hubungan seks dengan lelaki-lelaki lain.

Diputuskan (menolak rayuan; mengesahkan sabitan dan hukuman)

Oleh Hishamudin Mohd Yunus HMR menyampaikan penghakiman mahkamah:

(1) Mahkamah, dalam menimbang apakah hukuman wajar yang harus dijatuhkan dalam kes-kes rogol statutori, sama sekali tidak boleh terlepas pandang akan fakta bahawa ia mempunyai tanggungjawab untuk melindungi gadis-gadis remaja seperti pengadu dari lelaki-lelaki tidak bermoral seperti perayu, yang sentiasa berkeliaran untuk mengambil peluang melakukan hubungan seks dengan gadis-gadis di bawah umur.

(2) Sebarang hukuman yang hendak dijatuhkan terhadap perayu selaku pesalah yang bersalah melakukan beberapa jenayah moral, hendaklah memenuhi tujuan-tujuan berikut, iaitu, mengikut urutan kepentingannya, pembalasan, pencegahan dan pemulihan. Berdasarkan fakta dan halkeadaan kes, hukuman seperti yang dijatuhkan oleh Hakim Mahkamah Sesyen adalah saksama dan berpadanan dengan keseriusan kesalahan-kesalahan yang dilakukan oleh perayu.

(3) Fakta bahawa perayu dan pengadu adalah sepasang kekasih dan bahawa perlakuan seks adalah atas dasar kerelaan bukanlah satu faktor peringan memandangkan pengadu masih di bawah umur sedangkan perayu sudah berumur 25 tahun. Malah, kelakuan perayu samalah seperti seorang yang mengambil peluang atas kementahan pengadu disebabkan umurnya yang muda dan hubungan rapatnya dengan perayu. Begitu juga, pengataan perayu bahawa pengadu mempunyai pengalaman seksual dengan lelaki-lelaki lain, jauh dari merupakan satu faktor peringan, sebenarnya dan paling tidak pun adalah satu tohmahan jahat. Jauh dari meraih simpati mahkamah, pengataan tersebut hanya menunjukkan bahawa perayu tidak pernah merasa menyesal atau malu atau bersimpati atas apa yang dilakukannya. Fakta bahawa pengadu mungkin mengadakan hubungan seks dengan lelaki-lelaki lain adalah juga tidak relevan bagi maksud rayuan peringanan.

Legislation referred to:
Penal Code, ss. 375, 376(1)

For the appellant - Narimah Nakolai (Chau Chin Tang with her); M/s Chau & Thien
For the prosecution - Jamil Aripin; DPP

[Appeal from High Court, Kota Kinabalu; Criminal Appeal No: K42-125 & 125(A)-2010]

Reported by Wan Sharif Ahmad

JUDGMENT

Hishamudin Mohd Yunus JCA:

[1] This is an appeal against the decision of the High Court of Kota Kinabalu that had affirmed the sentences imposed by the Sessions Court of Kota Kinabalu on the appellant.

[2] At the Sessions Court the appellant was charged with the three counts (charges) of rape (s. 376(1) of the Penal Code) of a 15-year-old girl. All the three offences were alleged to have been committed on a particular night (7 March 2009), nearby or at the Beaufort Railway Station.

[3] Section 376(1) provides:

> Punishment for rape
>
> 376. (1) Subject to subsections (2), (3) and (4), whoever commits rape shall be punished with imprisonment for a term which may extend to twenty years, and shall also be liable to whipping.

[4] Section 375 provides:

> Rape
>
> 375. A man is said to commit 'rape' who, except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the following descriptions:
>
> ...
>
> (g) with or without her consent, when she is under sixteen years of age.

[5] The appellant had claimed trial to the charges. He denied having had sexual intercourse with the complainant. At the conclusion of the trial, the Sessions Court found him guilty of attempted rape on the first count (charge); and guilty of the offences of rape on the remaining two counts (charges).

[6] On the first charge (of attempted rape), he was sentenced to four years' imprisonment. On the remaining two charges (of rape), he was sentenced to 11 years' imprisonment for each of the charges. All the three sentences were ordered to run consecutively.

[7] Aggrieved by the sentences, the appellant appealed to the High Court of Kota Kinabalu.

[8] The appeal was dismissed. The sentences were affirmed by the High Court of Kota Kinabalu.

[9] The appellant now appeals to this court.

[10] On 27 September 2012, we dismissed the appeal.

[11] We now give our grounds.

[12] From the evidence adduced at the trial and accepted by the trial judge, the facts of the case are these. At the time of the commission of the offences, the appellant was 25 years of age; whilst the complainant was 15 years and four months. The appellant then was courting her. On the day of the incident, she went out with the appellant after attending a friend's birthday party. The appellant first brought her to Waterfront Jetty at Beaufort, and there, at the jetty, at about 8pm, whilst on a bench, he attempted to rape her (the first charge). The appellant then took the complainant to the nearby Beaufort Railway Station, and in a stationary coach, he raped her. This happened around 9pm the same night. Then they went to another stationary coach, where, at around 11pm, the appellant raped the complainant for the second time.

[13] The complainant spent the night in the coach with the appellant. The next morning, the appellant took the complainant to his house where she spent a night there.

[14] Meanwhile, the victim's parents were searching high and low for her.

[15] The complainant was eventually united with her parents on 9 March 2009, when the appellant took the complainant back to the Beaufort Railway Station.

[16] In mitigation, the appellant states in his petition of appeal:

(a) that both he and the complainant were lovers, and that the sexual acts were consensual;

(b) that the complainant at the time of the commission of the offences was almost 16; and

(c) that the complainant have had sexual experiences with other men previously.

[17] In our judgment, in deciding this appeal, we constantly remind ourselves that any sentence to be imposed on the appellant, an offender guilty of several moral offences, must be with a view to achieve the following purposes. Firstly, and we consider this to be the most important purpose of all, is retribution. Retribution means justice to the victim of the crime; to avenge the wrong that was done to the victim by the offender. The severity of the punishment by the state's machinery of justice on the offender must commensurate with the gravity of the offence committed and the pain (or suffering) inflicted by the offender on his victim.

[18] Secondly, and next in terms of importance, the punishment must be such of a nature that it should serve as a deterrence to others.

[19] And, thirdly, the purpose of the punishment is to reform the offender.

[20] Now, on the question of deterrence, let it be said here that we take judicial notice that statutory rapes are rampant nowadays. Therefore, we consider it to be our solemn duty that by this judgment we should take the opportunity to issue a message to the public. So, we have this to say. The courts in considering what ought to be the appropriate sentence in cases of statutory rapes must never for a moment lose sight of the fact that they have a duty to protect young girls such as the complainant in the instant case from unscrupulous men such as the appellant, always on the prowl to take sexual advantage of female minors. Hence, the courts must take a stern view of such offences, and in passing

out sentences, the courts must give out the correct message to the public, that the courts view such offences with much detestation.

[21] On the facts of the present case, and bearing in mind the aforesaid purposes of punishment as we have set out, we consider the punishment as imposed by the Sessions Court Judge to be fair and commensurate with the seriousness of the offences committed by the appellant. And so we affirm the sentences.

[22] In the present case, the appellant states that he and the complainant were lovers and that the sexual acts were consensual. We do not consider this to be a mitigating factor as the complainant was a minor and the appellant was 25. We are rather inclined to view the conduct of the appellant as a person taking advantage of the vulnerability of the complainant by reason of her young age and her waywardness, and her close relationship with the appellant.

[23] In his plea of mitigation the appellant also said that the complainant have had sexual experiences with other men. We are perplexed that this had to be said by the appellant. We consider it rather mischievous for the appellant to have had the audacity to make such a statement in the course of making a plea in mitigation, to say the least. By making such an allegation, far from attracting the sympathy of this court towards the appellant, it only gives the impression that there is no feeling of remorse or shame or sympathy on the part of the appellant for what he had done. Now, it happened to be the case here that the appellant, during the trial and prior to the trial court's finding of conviction, had denied raping the complainant, and that the complainant, when cross-examined by defence counsel, had been candid and had admitted to also having been raped by some other youths (apart from the appellant) at the railway station on the night of the 7 March, and in the appellant's house on the night of the 8 March 2009; and used to have sexual intercourse with her former boyfriend previously. But, in our judgment, these facts are totally irrelevant for the purpose of the plea in mitigation, and should never have been mentioned at all by the appellant in the first place in the course of making a plea in mitigation.

[Appeal dismissed; conviction and sentences affirmed.]